No. 343

In the

Supreme Court of the United States

October Term, 1957

AMERICAN MOTORS CORPORATION, a MARYLAND CORPORATION, formerly known as NASH-KELVINATOR CORPORATION, a MARYLAND CORPORATION, and UNITED STATES OF AMERICA, Intervenor, Appellants

vs.

CITY OF KENOSHA, a Municipal Corporation

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

MOTION TO AFFIRM
ALTERNATIVE MOTION TO DISMISS

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OBJECT OF MOTIONS

Appellee moves the court to affirm the judgment of the Wisconsin Supreme Court on the ground that it is manifest that the questions on which the cause depends are so unsubstantial as not to need further argument (Rules 16-1 (c)). In the alternative, appellee moves the court to dismiss the appeal on the ground that it does not present a substantial federal question (Rule 16-1 (b)).

The basis for both motions is that the federal question here involved was properly determined by the Wisconsin Supreme Court in accordance with settled principles of federal law.

RESTATED QUESTIONS

Appellee believes that the following questions describe the issues to be decided by this court more accurately than the questions set forth in Appellants' Jurisdictional Statement (p. 5).

1. Were Wisconsin personal property taxes levied on an ownership interest of the United States?

2. If the answer to question 1 is "yes" then in what articles of personal property did the United States have an ownership interest?

ARGUMENT

I.

Wisconsin ad valorem Tax Statutes, as Construed by the State Supreme Court, Properly Exclude Ownership Interests of the United States.

The Wisconsin Supreme Court held that taxation of the property in question depended upon ownership and not title (pp. 319-21 of 274 Wis.; Appellants' Appendix, pp. 33-4). It further held that "property of the federal government * * * is not subject to any form of state taxation" (p. 319 of 274 Wis.; Appellants' Appendix, p. 33). This is in accord with federal decisions, and the Wisconsin Supreme Court so stated (p. 320 of 274 Wis.; Appellants' Appendix, pp. 33-4).

Thus, this court has consistently held that federal immunity from local *ad valorem* taxes depends upon the government's "ownership interest" rather than title. *Offutt Housing Company v. Sarpy County* (1956), 351 U. S. 253, 261-2 (Footnote 1); *S. R. A., Inc. v. Minnesota* (1946), 327 U. S. 558; *United States v. Allegheny County* (1944), 322 U. S. 174, 187. Consider the following:

> "Labeling the Government as the 'owner' does not foreclose us from ascertaining the nature of the real interests created * * *. The Government may have 'title,' but only a paper title * * *." *Offutt Housing Co. v. Sarpy County, supra,* at 261.

> "It [federal immunity] should be sufficiently flexible to subject real private rights, disentangled from federal policies, to state taxation * * *. Ownership of the beneficial interest has passed to the petitioner with legal

title retained by the United States for security purposes." *S. R. A., Inc. v. Minnesota, supra,* at 569-70.

"We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner." *United States v. Allegheny County, supra,* at 187.

II.

The Wisconsin Supreme Court Correctly Determined that the Taxes in Question were NOT levied on an Ownership Interest of the United States.

Under its contract with the Air Force, American Motors Corporation retained substantially all incidents of ownership in the property in question (i.e., raw materials, supplies, work in process and completed parts for aircraft engines), including the risk of loss and rights of possession, use, and disposition. In other words, notwithstanding the passage of "title," the contract so effectively reserved all incidents of ownership to American Motors Corporation that the government acquired no substantial ownership interest. The fact that the government acquired "title" and contractual controls "as a regulatory mechanism" does not in itself create an ownership interest. *Offutt Housing Company v. Sarpy County* (1954), 351 U. S. 253, 261; *S. R. A., Inc. v. Minnesota* (1946), 327 U. S. 558.

In order for the government to acquire a true ownership interest, its "title" must be buttressed by some of the normal incidents of ownership as was the situation in *United States v. Allegheny County* (1944), 322 U. S. 174.

In that case, the government—and not the contractor—retained the risk of loss and right of disposition.

The statement in Appellants' Jurisdictional Statement (p. 6) that none of the assessed property "was or could have been used by American Motors for purposes other than those of the contract" adds little to the argument since it was the contract *itself* which gave American Motors Corporation the risk of loss and all incidents of ownership. The contract even contained a reversion of "title" clause in respect to property not delivered to and accepted by the government. It is obvious that the government never intended to acquire ownership of materials, supplies, work in process and parts *unless* and *until* they were incorporated into finished aircraft engines and accepted by government inspectors.

III.

The Wisconsin Supreme Court correctly Applied State and Federal Law.

Contrary to the statements in Appellants' Jurisdictional Statement (pp. 9, 11), the Wisconsin Supreme Court did not consider the ownership question to be purely "one of local law." After determining that federal and Wisconsin law are alike on this question (p. 320 of 274 Wis.; Appellants' Appendix, pp. 33-4), the Wisconsin court applied the rule of *Offutt Housing Company v. Sarpy County* (1956), 351 U. S. 253, 261, that the court may disregard a paper title and ascertain the "nature of the real interests created."

CONCLUSION

Appellee moves the court to affirm the judgment of th Wisconsin Supreme Court or, in the alternative, to dismis the appeal.

Respectfully submitted,

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